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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 671

CARGILL, INCORPORATED,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Cargill, Incorporated, petitioner, by its attorneys, prays that a Writ of Certiorari issue to review the judgment of the Seventh Circuit Court of Appeals (R. 74) which affirmed an order of the District Court of the Northern District of Illinois, Eastern Division (R. 52), sustaining a motion to dismiss the complaint of petitioner charging a conspiracy in restraint of interstate trade and commerce in grain and grain futures and praying for damages and injunctive relief.*

* At least two federal agencies have submitted critical analyses of the situation involved in the instant case. See, Commodity Exchange Authority Report: "Effect on Futures Trading in Grains of Changes in Price Ceilings of May 13, 1946" (Aug. 12, 1946); also the Federal Trade Commission Report: "Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946" (Feb. 4, 1947).

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 49) is not officially reported, and the opinion of the Circuit Court of Appeals (R. 69)* is not yet reported.

STATEMENT.

The action arises under Section 1 of the Sherman Act (15 U. S. C., § 1) and Sections 4 and 16 of the Clayton Act (15 U. S. C., §§ 15, 26).

The pertinent facts set forth in the complaint and admitted by the motion to dismiss are as follows:

Petitioner, in the course of its business of merchandising, warehousing and distributing grain in interstate and foreign commerce, enters into futures contracts on respondent Board in "hedging" operations which are essential to petitioner's extensive financing requirements (R. 30-31). Accordingly, on May 12, 1946, petitioner was "long" more than 5,000,000 bushels of grain under futures contracts calling for delivery in May, July, September and December, 1946 (R. 34).

Respondent Board of Trade is a "contract" market so designated by the Secretary of Agriculture under Section 5 of the Commodity Exchange Act (7 U. S. C. § 7), and respondent Clearing Corporation is an affiliate of the Board.** The individual respondents are officers and directors of the Board or Clearing Corporation (R. 29-31).

* At the same time the Circuit Court of Appeals affirmed an order of dismissal in a similar action against respondents. *Belz* v. *Board of Trade* (No. 9439). Petitioner is advised that a petition for certiorari will also be filed in that case.

** See Appendix, p. 27, *infra*, for description of the method of clearing trades on the Board, and the part played therein by respondent Clearing Corporation.

On May 8, 1946, after governmental agencies had announced increased ceiling prices of grain, effective May 13, 1946, respondents, in order to protect from financial loss those on the "short" (*i. e.*, sellers) side of the market, engaged in a combination and conspiracy in restraint of interstate commerce in grain and grain futures in violation of Section 1 of the Sherman Act, to prevent the prices of grain futures contracts from reflecting the value of such grains, to control and fix the prices of such futures contracts, and to limit and restrict trading therein (R. 35-36). On May 12, 1946, respondent Board as a part of said conspiracy enacted Regulation 1894* (R. 43), which stopped trading in futures contracts calling for delivery of grains in May, July, September and December, 1946, except for the purpose of liquidation at the *old* ceiling prices in effect on May 11, 1946 (R. 36). * * None of these contracts could possibly be in default until the end of the respective delivery months involved. Regulation 1894 further provided for trading in *new* contracts calling for deliveries of wheat, oats, barley and rye in November and December, 1946, and of corn in January and March, 1947, at or below the *new* ceiling prices (R. 36).

As the result of Regulation 1894, petitioner's contracts were rendered valueless as a source of grain and as protection against price fluctuations, and the "shorts" were relieved of their obligation to deliver grain and to pay to respondent Clearing Corporation through their brokers the amounts which they would have otherwise been obligated to pay.

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* It was recited therein that certain government agencies had "* * * requested and recommended to the governing boards of Grain Exchanges that all futures contracts open at the close of business on May 11th be settled at the then applicable ceiling prices * * *." (R. 43).

** Compare other action taken by respondent Board in 1917 (Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading" (1926), Vol. VII, pp. 259, 382); and in 1943 and 1946 (Affidavit of Austen S. Cargill (R. 22)).

On May 21, 1946, petitioner filed its original complaint to enjoin respondents from carrying into effect Regulation 1894 (R. 2). Thereafter, on May 31, 1946, respondents adopted Regulation 1897, in effect rescinding Regulation 1894, with respect to *May* contracts, and providing for the settlement of grain futures contracts calling for delivery in May, 1946, at the *new* ceiling prices (R. 37, 44). On the same date they also adopted Regulation 1898,* which repealed Regulation 1894 and permitted trading in all futures contracts outstanding at the close of business on June 1, 1946, (including the July, September and December 1946 contracts) at or under the *new* price ceilings established May 13, 1946 (R. 37, 45).

Petitioner became entitled to $1,075,650.52 as the result of Regulations 1897 and 1898. However, on June 4, 1946, as a part of the conspiracy to save the "shorts", the Clearing Corporation notified its members that these regulations were being challenged in the courts, and that all amounts paid to traders thereunder should be returned to it in the event either or both of the regulations were ultimately held invalid. As a result of the notice petitioner received only $607,552.50 of the sum to which it was entitled (R. 38).

Later, anticipating the expiration of price controls on June 30, 1946, and as a part of the continuing combination and conspiracy to protect the "shorts",** respondents

* It appears from said Regulation (R. 45) that the Directors of the Board had asked certain government agencies to issue a directive embodying the governmental request recited in Regulation 1894 but that "the agencies have found, and still find, they cannot issue * * * [such directive]."

** As stated in the Federal Trade Commission Report (Feb. 4, 1947), *supra* (p. 28): "Naturally the financial interest of commission houses as well as speculators on their own account, both within the Board of Trade and outside its membership, would tend to make them favor closing out outstanding 'old' contracts at the old ceilings and starting trading anew with 'new' contracts." See also, Appendix, p. 30, *infra*.

caused the enactment of Regulation 1899 (R. 39, 46) on June 13, 1946, which stopped trading in grain futures contracts calling for delivery in July, September and December, 1946, and provided that they "be settled without delivery and by payment and acceptance of settlement prices, which shall be the closing price quotations of each of said futures on this Exchange on this day." Regulation 1899 was carried into effect with the result that the prices of said contracts were fixed at prices prevailing on June 13, 1946, although such contracts would not mature until the end of the named delivery months (R. 40).

On June 13, 1946, petitioner was "long" more than 5,000,000 bushels of various grains deliverable in the three months indicated. As the result of respondents' conduct it was deprived of the benefits of its contracts, and conversely the "shorts" were relieved of their obligations thereunder. Petitioner was thereby compelled to purchase cash grain wherever it could be found and at prices in excess of those provided in its futures contracts (R. 38-40).

Following the removal of OPA ceilings on June 30, 1946, the cash prices of grain advanced. But for the wrongful action of the respondents in the enactment of Regulation 1899, the prices of petitioner s futures contracts would also have similarly increased, and it thereby suffered further damage in the sum of $2,851,225.00 (R. 40-41).

The motion to dismiss challenged the sufficiency of the complaint* under the Sherman Act (R. 47). In sustaining the motion, the District Court (R. 49) apparently recognized that the conduct of respondents constituted price-fixing (R. 50) but held that under the Board's Rule 251**

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* The Amended and Supplemental Complaint filed March 17, 1947 (R. 28).

** "251. Emergencies. The Board shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any

respondent Board had lawful authority to take the action complained of, stating (R. 51):

> "No board of trade or stock exchange could exist without some such rule as No. 251 above mentioned. Neither could the economic stability of any country be guaranteed in time of war or great emergency unless some power exists somewhere lawfully to control price and prevent extortionate settlements for those who had sold grains for future delivery."

The Circuit Court of Appeals in affirming the order of dismissal stated as to the conduct of respondents (R. 73):

> "* * * [it] was not price-fixing. It was the establishment of a measure of damages for the liquidation of the contracts terminated and in which there was to be no further trading."

And further (R. 73):

> "Neither is the termination and settlement an illegal restraint of commerce. Almost every act of an agency such as the Board and Clearing affects or restrains commerce in some respects, but such restraints as may be within the rule of reason are not unlawful." (Citing *Board of Trade* v. *United States*, 246 U. S. 231.)

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commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power. Such contracts shall also be subject to the exercise by Clearing House of the powers reserved to the Clearing [illegible] its Charter, By-Laws, and Resolutions" (R. 9).

QUESTIONS PRESENTED.

The general question involved is whether the complaint states a cause of action under the Sherman Act; and in particular, whether the conduct of respondents in adopting and in enforcing Regulations 1894 and 1899, on May 12 and June 13, 1946, respectively, which stopped trading in grain futures contracts (not in default) and fixed settlement prices at those prevailing on said dates, constituted "price-fixing" condemned by the Sherman Act.

Even if such action be held not to constitute "price-fixing", the further question is presented whether the complaint otherwise alleges an unreasonable restraint of trade in violation of the Sherman Act.

STATUTES INVOLVED.

Section 1 of the Sherman Act:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *" (15 U. S. C., § 1.)

Section 4 of the Clayton Act:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U. S. C., § 15.)

Section 16 of the Clayton Act:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws * * *." (15 U. S. C., § 26.)

JURISDICTION.

Judgment of the Circuit Court of Appeals was entered on December 23, 1947 (R. 74). Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of Feb. 13, 1925, 28 U. S. C. § 347(a).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the complaint failed to state a cause of action under the Sherman Act.

2. In holding that the conduct of respondents complained of was legal and proper.

3. In holding that the complaint failed to allege facts entitling petitioner to the relief sought.

4. In affirming the judgment of the District Court dismissing the action.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With the Applicable Decisions of This Court.

In holding that the conduct of respondents in stopping trading in futures contracts and fixing settlement prices thereof at the prices prevailing months in advance of their maturity, did not constitute "price-fixing" or an unreasonable restraint of trade, the court below failed to follow the applicable decisions of this Court.

A. Respondents' action constituted "price-fixing" and was illegal per se under U. S. v. Socony Vacuum Oil Co., 310 U. S. 150.

The court below erroneously considered the action of respondents as "the establishment of a measure of damages for the liquidation of contracts terminated and in which there was to be no further trading" (R. 73).*

*Even if this analysis were correct, the action nevertheless amounted to an unreasonable restraint (see p. 13, *infra*). Cf. *Paramount Famous Lasky Corp.* v. *U. S.*, 282 U. S. 30, in which a standard exhibition contract providing for arbitration was held violative of the Sherman Act. In so holding, the Court stated (p. 43):

> "It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal."

This view ignores the fact that the contracts involved called for deliveries of grain in distant months, and that prior to the maturity of such contracts many conditions would have arisen to appreciably affect their ultimate value. Until the delivery month arrived, the exact measure of the liability of the "shorts" for a default could not be determined. Moreover, there was no certainty that defaults would occur. But for respondents' wrongful action, the prices of such contracts would have varied from day to day and from minute to minute. In requiring parties to be bound by a fixed price determined months in advance of delivery dates, respondents prevented normal price variations and arbitrarily measured the rights and liabilities under such contracts on the basis of existing prices. This is *price-fixing* and is not the "establishment of a measure of damages" or fact-finding essential in any real arbitration or true determination of damages which must, of course, be based on objective standards and supported by evidence.

Accordingly, the premature termination of such contracts and the arbitrary fixing of the prices thereof, measured by existing ceiling prices or by closing market quotations interfered with the free play of economic forces and thwarted the normal operation of a contract market as envisaged by the Commodity Exchange Act.

The economic rationalé underlying the rule against price-fixing clearly calls for its application here. A commodity exchange, in serving its proper function as an important institution in our economy, must permit full expression of the conflicting interests of buyers and sellers.

In *U. S.* v. *Socony Vacuum Oil Company,* 310 U. S. 150, the Court stated (pp. 221-223):

> "*Any combination which tampers with price structures is engaged in an unlawful activity.* Even though

the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

"• • • prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. *They are fixed because they are agreed upon.* And the fact that, as here, they are fixed at the fair going market price is immaterial."

• • • • •

"And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." (Italics ours.)

The action of respondents thus constituted "market manipulation" and "price-fixing" such as was condemned by the *Socony* case, and the court below was obviously in error in stating, with reference to that case and *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, that "these cases do not define and delineate what is price-fixing" (R. 73).

Board of Trade v. *U. S.*, 246 U. S. 231, cited by the court below (R. 73), rather than supporting its decision, indicates that an illegal restraint of trade was imposed here. In that case the "Call Rule" of the Board was upheld as a reasonable restraint. The Court there pointed out (unlike the instant case) no attempt was made to show

that the rule "had the effect * * * of retarding or accelerating shipments; or of raising or depressing prices; or of discriminating against any part of the public or that it resulted in hardship to anyone * * *." In the *Socony* case, the Court, in distinguishing the *Board of Trade* case (310 U. S. at p. 217), pointed out specifically that the Call Rule was

> "not aimed at price manipulation or the control of market prices and * * * had 'no appreciable effect on general market prices' * * *."

The decisions relied upon below by respondents (but not cited by the court on this point) are also inapplicable. In *Thomson* v. *Thomson,* 315 Ill. 521 (1925), and *Crowley* v. *Commodity Exchange,* 141 F. 2d 182 (CCA 2, 1944), violation of the federal anti-trust laws was neither charged nor considered. Moreover, both decisions are clearly distinguishable on their facts from the instant case. In the *Thompson* case the closing market price on July 5, 1917 for the July futures closed out, was used as the "true commercial value" of the contract.* In the *Crowley* case, market quotations of the day on which performance was made illegal by *governmental* action

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* In Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading" (1926), Vol. VII, p. 259-60, it is stated in showing that even such a situation does not involve a true settlement on default since made "prior to the close of the delivery month":

> "Nature of Decreed Settlements.—The case of settlement on default is to be distinguished from the decreed or forced settlement. The former occurs after trading in the option to which the contract relates has run its course and expired. If the buyer on such a defaulted contract is willing to accept a belated delivery the obligation may be settled in that way. The buyer may also agree with the seller as to the amount to be paid in lieu of delivery. In the absence of a voluntary settlement accepted by both parties, the default is passed upon by a committee of the board which fixes a price and in addi-

were accepted as establishing the value on that date. It was not known when, if ever, this impossibility would be removed, and the effective date of the prohibition of delivery was taken as the date of the breach; and the value as determined by market quotations on that day adopted as a basis for settlement.

B. The conduct of respondents constituted an unreasonable restraint of trade.

Even if the court below were correct in holding that the conduct of respondents was not "price-fixing" and not illegal *per se* within the rule of the *Socony* case, it should, nevertheless, have found that such action constituted an unreasonable restraint of trade under the rules consistently laid down by this Court.*

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tion a penalty for not specifically living up to the contract. Such a settlement on default can be made in the light of all the facts having a bearing on the value of the future contract in question. The option has expired and the prices on trades in the pit up to the end of the last day are known; all the conditions as to available cash supplies and as to prices in other markets during the life of the contract can be ascertained. None of these conditions applies where a settlement is forced prior to the close of the delivery month."

"* * * The decreed settlement was intended, indeed, to prevent anticipated future developments and was not merely a quasi-judicial determination of value or price with reference to completed events."

A fortiori the settlement of the prices of contracts maturing in distant months lacks the requirements of a "quasi-judicial" determination.

* *Standard Oil Co.* v. *U. S.*, 221 U. S. 1; *Eastern States Retail Lumber Dealers' Ass'n.* v. *U. S.*, 234 U. S. 600, 611, 613; *U. S.* v. *Patten*, 226 U. S. 525, 543; *Sugar Institute* v. *U. S.*, 297 U. S. 553, 597, 599; *Nash* v. *U. S.*, 229 U. S. 373, 376; *U. S.* v. *Linseed Oil Co.*, 262 U. S. 371, 388, 390.

The regulations of the Board now in question were without congressional sanction* and by arrogating unto themselves, a private body, the power to regulate interstate commerce, respondents unlawfully impinged upon the powers of Congress and violated the Sherman Act.**

The essence of a futures contract is its *price,* whether the contract is consummated by delivery or otherwise and whether the contract is employed as a source of supply or as a method of price insurance. The regulations of the Board under attack here vitally affected this integral feature of petitioner's futures contracts and thus, contrary to the Sherman Act, imposed an obstruction to, and burden upon, interstate commerce. See, Section 3 of the Commodity Exchange Act (7 USC § 5) for congressional recognition of the significance of such a restraint.

In *Board of Trade* v. *Olsen,* 262 U. S. 1, this Court stated in rejecting the attack then made by respondent Board on the constitutionality of the Grain Futures Act (p. 40):

> *"The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.* By reason and authority, therefore, in determining the validity of this Act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the

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* In *Rice* v. *Chicago Board of Trade,* 331 U. S. 247, 253 (n. 4) the Court in discussing the Commodity Exchange Act said that Congress "* * * did not undertake to put behind them [the Board's rules] civil or criminal sanctions" and that "we therefore have no attempt here to endow private groups with law-making functions * * *."

See also, *Georgia* v. *Pennsylvania Railroad Co.,* 324 U. S. 439, 459.

** *Addyston Pipe & Steel Co.* v. *U. S.,* 175 U. S. 211, 242; *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465; *Associated Press* v. *U. S.,* 326 U. S. 1, 19.

> Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain * * *." (Italics ours.)

In *U. S.* v. *Patten*, 226 U. S. 525, this Court stated in holding that a corner of the cotton futures market constituted an unreasonable restraint of trade (p. 542):

> "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it *also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.*" (Italics ours.)

Further, petitioner's futures contracts contemplated delivery of grain, and petitioner had reason to rely on such contracts as a source of grain (R. 40). In relieving the "shorts" of their obligation to deliver grain and eliminating this source of supply, respondents prevented deliveries of grain and obstructed the free flow of commerce.

The direct and immediate effect of the combination and conspiracy charged by petitioner is thus clear: The value of petitioner's hedging contracts was destroyed; the operation of the laws of supply and demand were thwarted and prices of grain futures were prevented from reaching their proper levels; "shorts" were relieved of their obligations to deliver grain and of the financial burdens incidental to changes in prices; "longs" were deprived of the right to insist upon the delivery of grain and of the benefits to which they were entitled under their contracts; the natural flow of grain into the Chicago market was impeded; hedgers and speculators were deprived of the right to transfer their futures contracts to others who, in a free market, would

have been willing to assume the risks involved; and the credit of "hedgers" which is so largely dependent on the price protection furnished by hedging, was impaired (R. 40-41).

It is thus apparent that the action of respondents (in the language of the court in the *Olsen* case, *supra* (id. p. 39)) resulted in prices not responsive to supply and demand, discouraged hedging, disturbed the normal flow of actual consignments, and thus imposed an obstruction on the free flow of commerce. And, just as this Court held with respect to the corner and enhancement of prices in the *Patten* case, this amounted to an unreasonable restraint of trade.

In dismissing the complaint and not allowing petitioner an opportunity to prove its clear and positive allegations of an unreasonable restraint of trade, the court below also failed to follow the decisions of this Court recognizing the necessity, in such cases, for a consideration of extensive factual data relating to the business affected.

Thus, in *Board of Trade* v. *U. S.*, 246 U. S. 231, 238, it was stated:

> "To determine that question [illegal restraint of trade] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."*

It is clear that the cause should have been remanded for trial as was done in *Anderson* v. *Shipowners' Association*,

* As stated by Mr. Justice Frankfurter in *Associated Press* v. *U. S.*, 326 U. S. 1, 27, whether there is an unreasonable restraint "* * * depends, in essence, on the significance of the restraint in relation to a particular industry."
See also, *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 360.

272 U. S. 359; cf. *U. S.* v. *Tarpon Springs Sponge Exchange*, 142 F. 2d 125, 127-28 (CCA 5, 1944), so that all relevant considerations could have been shown by petitioner.

C. Emergency Rule 251 of the Board of Trade does not render the conduct of respondents lawful.

Congress has not granted the Board any exemption from the anti-trust laws. Although its activities have been regulated by the Commodity Exchange Act, Congress has not seen fit to endow the Board with any power to regulate interstate commerce. "Regulated industries are not *per se* exempt from the Sherman Act." *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439, 456. It is also clear that the Sherman Act is applicable to trading in futures contracts on the Board of Trade. *U. S.* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 554 (n. 40). If Congress had intended to exempt the Board from the Sherman Act it would have clearly said so. *U. S.* v. *Borden Co.*, 308 U. S. 188, 199-201; *U. S. Alkali Export Association* v. *U. S.*, 325 U. S. 196, 206; *Georgia* v. *Pennsylvania Railroad Company*, *supra*, at pp. 456-457; *U. S.* v. *South-Eastern Underwriters Association*, *supra*, at pp. 553-554, 560-561. As stated in the *Socony* case, *supra* (at p. 222): "Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike."

Reliance of the court below upon Emergency Rule 251 of respondent Board (R. 72), in sustaining the legality of the acts in question, was therefore contrary to the decisions of this Court.

Thus, in *Anderson* v. *Shipowners' Association*, 272 U. S. 359, 362 this Court stated, with reference to the rules established for the employment of seamen whereby each

of the parties concerned "surrendered himself completely to the control of the associations" (p. 365):

> "• • • *These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-trust Act.*" (Italics ours.)

In *Associated Press* v. *U. S.*, 326 U. S. 1, the Court, after citing the *Anderson* case, stated (p. 19):

> "• • • arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose. • • •"

So, in the instant case, the rules and regulations of a private group cannot be used as a means to obstruct and restrain interstate commerce. As stated in *U. S.* v. *Yellow Cab Company*, 332 U. S. 218, 226, the Sherman Act is "designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved."

We therefore submit that the court below, in deciding important questions of federal law, has misinterpreted and failed to follow the applicable decisions of this Court.

II.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

The decision below, in destroying the sanctity of grain futures contracts, poses important questions as to the position of commodity exchanges in the economy of the nation and as to the power of private groups to regulate interstate commerce. It is imperative that this Court determine whether the action of a contract market in closing trading

in futures contracts and in enforcing a decreed settlement price *months prior to the arrival of the delivery dates involved* and before any actual defaults have occurred or may be imminent, constitutes the kind of "price-fixing" condemned by the Sherman Act, or otherwise amounts to an unreasonable restraint of trade. While it would seem clear that respondents' conduct runs afoul the anti-trust laws, the vital questions presented have, however, not heretofore been directly passed upon by this Court.

A. The Importance of the Chicago Board of Trade.

The Chicago market is the world's largest grain futures market,* and over 90% of grain futures trading in the United States is conducted on respondent Board, which has been designated as a contract market pursuant to the Commodity Exchange Act.

Transactions in grain futures on such markets "*are affected with a national public interest;*" and "the prices involved in such transactions are generally quoted and widely disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and consumer of [commodities] and the products and by products thereof;" and "such transactions are utilized by shippers, dealers, millers and others in interstate commerce *as a means of hedging themselves against possible loss through fluctuations in price.*" (Section 3, Commodity Exchange Act, 7 U. S. C., § 5.)

B. Public Benefits of Hedging on Commodity Exchanges.

In furnishing facilities for such hedging contract markets serve a vital function and play an important part in the economic progress of our nation. Hedging permits farmers, dealers and processors of grain who are con-

* See, *Rice* v. *Chicago Board of Trade*, 331 U. S. 247, 249-50, also R. 72, and para. 12 of the complaint (R. 31).

fronted with the risk of fluctuations in prices through ownership of grain to pass such risks to others who wish to assume them.* And as a result, many social and economic benefits inure to the public generally.

Thus, hedging has reduced the cost of handling commodities, so that the middle-man is willing to take a smaller margin of profit, and thus pay the producer a higher price and sell to the consumer at a lower price than would otherwise be possible. See, *Board of Trade* v. *L. A. Kinsey Co.*, 130 Fed. 507, 511 (C.C.A. 7 (1904)); affirmed *sub. nom. Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236; *Baer & Woodruff* "Commodity Exchanges" (1929), p. 215, and *Hoffman*, "Future Trading Upon Organized Commodity Markets of the United States", pp. 409-410 (1932).**

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*In the Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading," Vol. VII (1926), it is stated, (p. 33):

> "Hedging in grain-trade practice may be defined as a combination of transactions in cash grain and in futures such that a purchase of the former is accompanied by a sale of the latter in corresponding quantity and vice versa. Hedging ordinarily involves fourfold transactions—an initial purchase and an initial sale, one of the cash grain and the other of the futures, and the opposite closing transactions in each. By means of hedging, a loss on the cash grain will presumably be offset by a gain on the futures and vice versa."

See also, statement of Mr. Justice Holmes in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 249; and also definition of "hedging" in Sec. 4a of the Commodity Exchange Act (7 U. S. C. § 6a), commented on in 54 Harv. L. Rev. 1373, 1374 (1941).

** In the brief filed by the Board in *Board of Trade* v. *Olsen*, 262 U. S. 1, it was stated (See, synopsis, p. 20, id.):

> "The bill avers and the evidence in the *Christie* case, 198 U. S. 236, showed that the grain buyers' profit in moving grain from the farmers to the foreign market—which formerly was from five to eight cents a bushel—had been reduced to not exceeding two cents a bushel by the opportunity afforded by future trading to the grain dealers to insure themselves against price fluctuations by the making of 'hedging' contracts."

(See also, Complaint, Para. 12, R. 32.)

Hedging also enables dealers in grain to handle larger quantities than would otherwise be feasible. This is particularly important to firms having limited financial resources. Competition is thereby stimulated, and monopoly prevented. As stated in Report of the Federal Trade Commission on The Grain Trade: "Effects of Future Trading", Vol. VII (1926) (p. 270):

> "In fact, it appears probable that without the hedging opportunity there would be much more concentration of the ownership of grain, and a greater extent of control of the grain trade by a few large concerns, than there is at present. The small man can now compete with the largest organization by reason of the hedging opportunity which makes it possible for him to operate without risking his whole capital on a single venture."

It is also stated in that report (p. 240):

> "It appears, therefore, that to remove the hedging opportunity would strengthen the tendency to integration and concentration of the grain business and related lines into the hands of a few corporations with large capital."*

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* In the report of the Canadian Royal Grain Inquiry Commission (1923) (quoted in *Baer & Woodruff, supra*, p. 193) it is stated:

> "(1) That a futures market permits hedging and that hedging by dividing and eliminating risks in price variations reduces the spread between the prices paid to the farmer for his produce and those obtained for it upon the ultimate market.
>
> "(2) That hedging facilitates the extension of credit and thereby reduces the cost of handling grain by making it possible for grain dealers to operate on less capital than would be the case otherwise.
>
> "(3) That for the same reason hedging makes a larger degree of competition possible in the grain trade, on a given amount of capital."

C. Interference With Hedging by the Illegal Action of Respondents and the Public Detriment Caused Thereby.

Respondents, by stopping trading in, and ordering the settlement of, unmatured futures contracts, at arbitrarily fixed prices, prevented price changes in futures contracts and relieved the "shorts" of their obligation to deliver grain to the buyers. This destroyed completely the protection against price fluctuations ordinarily afforded by hedging. The "longs" were thus deprived of the right to "remove" their hedges, as and when cash grain was acquired by them to satisfy forward sales of grain or grain products, by a sale of their futures contracts at prices reflecting their true value in the course of free and unrestricted trading. At the same time, the action of respondents relieved the sellers of the obligation to deliver grain, and deprived the buyers of the right to take delivery. The value of futures contracts was thereby jeopardized, and deliveries of actual grain stopped, to the detriment of traders, such as petitioner, relying on the facilities of the Board as a source of supply.

The baneful effect of so severing the connection between futures contracts and cash grain is commented on in the Federal Trade Commission Report: "Agricultural Income Inquiry" (1937, Part I) as follows (p. 348):

> "Although the bulk of future trades are settled without actual delivery of grain, every future contract legally contemplates delivery, and this contemplated delivery is in fact the ultimate basis for the value of the future contract. Furthermore, deliveries on futures constitute the channel of connection between cash and futures and this channel should be kept in use and unobstructed. It is only by the maintenance of this connection between the cash and futures market that future trading can perform useful functions in affording facilities for hedging or in effecting claimed stabilization of prices. The Federal Trade Commission has

in the past stated that it believes that the system of future trading, in order to be sound, ought to make every practicable provision for the actual delivery and taking in of the commodity traded in, even though the contract may seldom be thus used.

"Trading in grain futures is fundamentally based upon a recognized and effectively administered grading system coupled with storage so conducted that the trader desiring to take delivery may feel confident that he will receive grain of a specified grade upon presenting the warehouse receipts tendered him. *Without such confidence on the part of holders of future contracts the connection between the cash and grain futures market is lost, the serviceability of futures for hedging is seriously impaired, and future trading degenerates into pure speculation and gambling.*" (Italics ours.)

To subject grain futures contracts to the whim and caprice of the management of contract markets will reduce trading to mere gambling as to when and on what basis settlement prices of such contracts will be fixed, and will lessen public confidence in commodity exchanges, discourage hedging and destroy the *raison d'etre* of futures trading. If gambling is thus to supersede legitimate speculation then contract markets are indeed imperiled.

As stated in Department of Agriculture, Circular 151 "Hedging in Grain Futures (June, 1931)" (p. 5):

> "*Unless he* [the hedger] *can rely upon an instantly available opportunity to either buy or sell futures in amounts to balance his cash-grain risks the futures market ceases to be for him a practical medium of protection.*"

And further (p. 19):

> "The futures market, if it is to serve fully the needs of the hedger at all times, must be a constantly available market. It must be a market where either purchases or sales can be made at any time in reasonably

large amounts without appreciable price effect. *This means that it must be a broad market, highly liquid, and free at all times from either individual or group control. It should be a market where the position of the small trader is just as secure as that of the large trader and where all may place their orders with equal confidence and equal certainty of prompt and efficient execution.*" (Italics ours.)

If the decision below, sanctioning the destruction of grain futures contracts on respondent Board and producing an intolerable situation in the grain trade, is allowed to stand, then the hedging process will be destroyed and can no longer be relied on as beneficial mechanism in our economy. Unless such a result is prevented by this Court, producers, handlers, processors and consumers will be deprived of the advantages of futures trading, and commodity exchanges will cease to serve any useful economic purpose.

The subject of commodity prices and trading on commodity exchanges dominates current economic thought. In view of the public importance of these problems the legal issues involved should now be settled by this Court, so that the rights and obligations of traders on commodity exchanges may be definitely established.

Conclusion.

It is therefore respectfully submitted that the Writ of Certiorari should be granted.

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APPENDIX.

Clearing Trades on the Chicago Board of Trade.*

Trading in grain futures on the Chicago Board of Trade, a contract market by designation of the Secretary of Agriculture pursuant to the Commodity Exchange Act, is conducted through the medium of its affiliate, the Clearing Corporation, which by Rule 314 of the Board becomes substituted as a seller to the buyer and buyer to the seller upon all futures contracts. Only those who are members of the Clearing Corporation* (known as Clearing Mem-

* For an explanation of the mechanics of futures trading, see Dept. of Agriculture, Circular 151: "Hedging in Grain Futures" (June, 1931). For a description of the method of clearing transactions on respondent Board, see *Board of Trade* v. *Christie Grain and Stock Company*, 198 U. S. 236. See also, the Federal Trade Commission Report (Feb. 4, 1947), *supra*, p. 35, for the method of settling futures trades on the Board.

* The close inter-relationship between the Board and Clearing Corporation is brought out as follows in the Federal Trade Commission Report (Feb. 4, 1947), *supra* (p. 33):

> "The governing body of the Chicago Board of Trade, collectively known as its Board of Directors, consists of 21 persons constituted as follows: The President, 2 Vice-Presidents, 15 Directors, elected from among the membership of the Chicago Board of Trade, and 3 non-member directors elected by the Board of Directors.
>
> "At the time Regulation 1894 was adopted, 10 of the member-directors and 2 of the principal officers (12 in all) of the 18 members of the Board of Directors who were elected from among the membership of the Association were also firm members, officers or employees of clearing house members."

bers) can use the facilities of that Corporation to clear futures transactions.

A Clearing Member who has open "long" commitments is a buyer from the Clearing Corporation to the extent of those commitments and, conversely, a member who is "short" becomes a seller to the Clearing Corporation to the extent of his open "short" commitments. At the close of each day a Clearing Member is either net "long", net "short", or "even" with the Corporation. He must settle his transactions at the close of each day based upon his net position. On account of price fluctuations, a Clearing Member, depending upon his net position, incurs either a gain or a loss. If he has a net "long" position and the market advances, he gains. On the contrary, if he has a net "short" position and the market advances, he sustains a loss. In the former case, he is entitled to payment of his gain but, in the latter case, he sustains a loss and becomes thereby a debtor to the Corporation in the amount of said loss. In order to insure the payment of any losses which may be sustained by the Clearing Member, he is obligated to deposit cash or securities with the Corporation, as provided in the Rules and Regulations (Rules 209, 210, 310, 315 and Regulations 1822 and 1822A of the Board, also By-laws 59 to 62, inclusive, of the Clearing Corporation (R. 33-4).

All members of the Board are not Clearing Members. Only Clearing Members can use the facilities of the Clearing Corporation, and it is through Clearing Members that other members of the Board clear their trades. Only members of the Board are permitted to enter into futures contracts on the Board and they act as agents for non-members. Since Clearing Members are required to deposit margins with the Clearing Corporation to secure their obliga-

tions to it, Clearing Members, in turn, require members of the Board for whom they clear futures contracts to deposit margins with them. Likewise, members of the Board, acting for non-member customers, require such customers to deposit sufficient margins. If the trader fails to meet margin requirements, the obligation next falls upon the Board member through whom he traded, and if he fails to meet his requirements then the Clearing Corporation looks to the Clearing Member. Failure of a Clearing Member or a member of the Board to meet his responsibilities subjects him to expulsion from the Board.

The agencies investigating the situation involved in the instant case found that generally the "shorts" were small speculators widely scattered.* See, Commodity Exchange Authority Report (Aug. 12, 1946), *supra*, where it was stated (p. 2):

> "It was found that, contrary to the usual situation, speculators in wheat and corn futures as a group were net short while hedgers as a group were net long. Particularly unusual was the fact that small speculators were predominantly short."

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* See Federal Trade Commission Report (Feb. 4, 1947), *supra*, where, in referring to earlier action of the Board of Trade, it was stated (p. 26):

> "• • • [it] undoubtedly had the effect of creating in the minds of short speculators, including both members and non-members of the Chicago Board of Trade, a feeling that they might safely sell futures at ceiling and default without danger of penalty. Commission merchants would benefit from any increased volume of trading resulting, and Clearing House members would be freed of responsibility for collecting penalties from their clients in case of default. All this undoubtedly accentuated the swing of speculative trading to the short side of the market."

And further (pp. 8-9):

> "This reversal of the usual tendency of speculators to be on the long side of the market is probably explained in part by the fact that with wheat and corn at or near ceiling levels speculators felt that any chance for profit would have to be on the short side of the market on the theory that the price could not advance beyond the ceiling."

If the market had advanced, members of the Board who were the "Commission Merchants" (brokers) with whom such "shorts" traded would have been subject to call by Clearing Members to provide additional margins and such Commission Merchants would in turn make demand upon their customers. In the event of a customer's failure to comply therewith, the Board member would then have been required to furnish such margin, and upon his failure to do so the Clearing Member would then have been responsible to the Clearing Corporation.*

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* See, Federal Trade Commission Report (Feb. 4, 1947), *supra* (p. 35) where it was stated:

> "Under these conditions, clearing members, and other Board of Trade members responsible to clearing members, faced the necessity of finding funds to cover under-margined accounts of their customers whose under-margined accounts could not be closed out. To maintain the financial solvency of the Clearing House, clearing members would have to dip into their own funds without adequate assurance of ability to collect funds so advanced from their under-margined customers who would be reluctant, and some financially unable, to respond to calls for increased margins."